

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: _____

Meeting Type: Regular

Meeting Date: Dec 18, 2014

Action Requested By: _____

Agenda Type: Resolution

Subject Matter:

Resolution consenting to the approval of settlement agreement in Dawson Building Contractors lawsuits.

Exact Wording for the Agenda:

Resolution consenting to the approval of a settlement agreement among the Public Building Authority, Dawson Building Contractors, Inc., Zurich North America Insurance Company, and Fibrebond Corporation.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: _____

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head:  _____

Date: Dec 18, 2014

RESOLUTION NO. 2014-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby, authorized to execute that Settlement Agreement (for the sole purpose of evidencing the City of Huntsville's consent to, and approval of, the Settlement Agreement) by and among the Public Building Authority of the City of Huntsville, Alabama, Dawson Building Contractors, Inc., Fibrebond Corporation, and Zuirch American Insurance Company, which said Agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Settlement Agreement, Assignment and Pro Tanto Release," consisting of sixteen (16) pages, with the date of December 18, 2014, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council. An executed copy of said document, after being signed by the Mayor, shall be permanently kept on file in the Office of the City-Clerk Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 18th day of December, 2014.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 18th day of December, 2014.

Mayor of the City of Huntsville,
Alabama

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

DAWSON BUILDING CONTRACTORS,)
INC.,)

Plaintiff,)

v.)

Civil Action No.: 2006-1887-DSP

THE PUBLIC BUILDING AUTHORITY OF)
THE CITY OF HUNTSVILLE, ALABAMA,)
et al.,)

Defendants.)

Consolidated With

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

THE PUBLIC BUILDING AUTHORITY OF)
THE CITY OF HUNTSVILLE, ALABAMA,)

Plaintiff,)

v.)

Civil Action No.: 2006-1943-KKH

DAWSON BUILDING CONTRACTORS,)
INC., *et al.*,)

Defendants.)

**SETTLEMENT AGREEMENT, ASSIGNMENT AND
PRO TANTO RELEASE**

This Settlement Agreement, Assignment, and Pro Tanto Release (the "Agreement") is entered into by and between the Public Building Authority of the City of Huntsville, Alabama, and the City of Huntsville, Alabama (collectively "PBA"), Dawson Building Contractors, Inc. ("Dawson"), Fibrebond Corporation ("Fibrebond"), and Zurich American Insurance Company ("Zurich") (collectively referred to as the "Parties") on this the ____ day of _____, 2014.

RECITALS

A. WHEREAS, the PBA undertook to build a detention facility in Huntsville, Alabama; and

B. WHEREAS Dawson served as the general contractor on the construction project for the detention facility (the "Project") for a portion of time; and

C. WHEREAS, Fibrebond was one of the suppliers of goods and services to Dawson on the Project; and

D. WHEREAS, Fibrebond was insured by Zurich during relevant times under a commercial policy of insurance with Policy No. CPO6584532-12 (and subsequent policy years) and an excess/umbrella policy of insurance with Policy No. CC6584634-12 (and subsequent policy years) (collectively the "Policies"); and

E. WHEREAS, a dispute arose regarding the Project among the Parties; and

F. WHEREAS, the dispute resulted in the filing of claims and two lawsuits in Madison County Circuit Court styled as *Dawson Building Contractors, Inc., v. The Public Building Authority of the City of Huntsville, et al.*, Case No. CV-06-1887-LWH and *The Public Building Authority of the City of Huntsville, Alabama, v. 2 WR/Homes-Wilkins Architects, Inc., et al.*, Case No. CV-06-1943 (the "Project Litigation"); and

G. WHEREAS, the PBA claims that Fibrebond is responsible for its designer's negligent and other conduct related to the Project, which allegedly resulted in millions of dollars in damages, as more fully set forth in the Project Litigation; and

H. WHEREAS, Fibrebond disputes that its own conduct resulted in any damage, but instead asserts that any of the PBA's alleged damages related to Fibrebond's scope of work are

attributable to the negligent and other conduct of Raley and Associates, Inc. ("Raley"), Fibrebond's designer on the Project; and

I. WHEREAS, Fibrebond demanded that Raley provide a defense and indemnification to Fibrebond, and filed a cross-claim against Raley in the Project Litigation; and

J. WHEREAS, Raley has refused to defend and indemnify Fibrebond; and

K. WHEREAS, Fibrebond and Zurich anticipate having to spend significant funds that far exceed the settlement amount paid under Paragraph 2 to defend against the PBA's claims; and

L. WHEREAS, Dawson has alleged that Fibrebond and Zurich are responsible, in part, for defense costs incurred by Dawson, among other damages; and

M. WHEREAS, the Parties wish to resolve the PBA's and Dawson's claims against Fibrebond and Zurich related to Fibrebond's work on the Project; and

N. WHEREAS, it is the intention of the Parties that Fibrebond not waive or release in this Agreement any of its claims against Dawson as set forth below in this Agreement; and

RELEASE

THEREFORE, in consideration of the covenants, recitals and promises set forth above and hereinafter, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties hereby agree as follows:

1. Paragraphs A through N of this Agreement set forth above as Recitals are incorporated by reference herein.

2. The PBA, and for its employees, individually and collectively, and, as applicable, each of its boards, authorities, commissions, committees, and departments, each of its elected or appointed officials, supervisors, employees, agents, members, directors, officers, and insurers,

and **Dawson**, and for its agents, former agents, owners, parent corporations, sister companies, parent companies, affiliates, affiliated companies, assignees, insurers, attorneys, bond companies, sureties, servants, stockholders, subsidiaries, employees, owners, officers, directors, partnerships, executors, administrators and assigns, for the consideration of **One Million, Two Hundred Thousand Dollars (\$1,200,000.00)** ("Settlement Amount") to be paid by Zurich, whether by check or wire transfer, to Upchurch, Watson, White and Max, unless otherwise directed by the PBA and Dawson, to be held in its trust fund ("Trust Fund") for the benefit of the PBA and Dawson, and for the consideration of the Assignment and related cooperation referenced below, do hereby release, acquit and forever discharge **Fibrebond**, and its agents, former agents, owners, parent corporations, sister companies, parent companies, affiliates, affiliated companies, insurers, attorneys, bond companies, servants, stockholders, subsidiaries, employees, owners, officers, directors, partnerships, executors, administrators and assigns, and **Zurich**, with respect to the Policies only, and its agents, former agents, owners, parent corporations, sister companies, parent companies, affiliates, affiliated companies, insurers, attorneys, bond companies, servants, stockholders, subsidiaries, employees, owners, officers, directors, partnerships, executors, administrators and assigns (collectively "Fibrebond"), of and from any and all claims, actions, causes of action, demands, rights, damages, costs, losses of service, expenses and compensation whatsoever, which the PBA and/or Dawson now have, or which may hereafter accrue, on account of, or in any way growing out of, any and all known and unknown, foreseen and unforeseen damages and the consequences thereof resulting or to result from the events made the basis or that could have been made the basis of Project Litigation. Payment of the Settlement Funds shall be made within a reasonable time not to exceed fifteen

(15) days after approval by the Huntsville City Council ("Council") and execution of the required release.

3. **The PBA and Dawson intend through this Agreement to completely release and to preclude any claims, whether in the form of subrogation or reimbursement, from any of their indemnitors, insurance carriers, or sureties, against Fibrebond, and against Zurich only as it relates to the Policies. No other party is intended to be, or is, release as a result of this Agreement.**

4. **Fibrebond does hereby release, acquit and forever discharge the PBA, and each of its boards, authorities, commissions, committees, and departments, and each of its elected or appointed officials, supervisors, employees, agents, members, directors, officers, and insurers of and from any and all claims, actions, causes of action, demands, rights, damages, costs, losses of service, expenses and compensation whatsoever, which Fibrebond now has, or which may hereafter accrue, on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen damages and the consequences thereof, resulting or to result from the events made the basis, or that could have been made the basis, of the Project Litigation.**

5. **Notwithstanding any other language in this Agreement, the Release with respect to Zurich is limited to claims that may be related to coverage afforded under the Policies only. Zurich was the insurer for other contractors on the Project, and nothing herein is intended to release any claims against Zurich or any of its other insureds who are parties and/or contractors involved with the Project.**

6. **The settlement memorialized by this Agreement is expressly subject to, and contingent upon, approval by the PBA and by the City Council for the City of Huntsville, Alabama ("Council"), at a regularly-scheduled public meeting. As such, any obligation of the**

PBA, Dawson, Fibrebond, and Zurich under this Agreement shall not be deemed final, operative, binding, or enforceable until such time as the Council and the PBA, by majority vote, pass a resolution approving the settlement. In the event the Huntsville City Council or the PBA declines to approve the settlement, the Agreement is null and void in all respects.

7. The Parties all agree that the allocation of all funds paid by Zurich under this Agreement shall be made by PBA and Dawson, as determined by them. The PBA and Dawson shall attempt to resolve their differences in the Project Litigation, but if they are unable to do so, all funds recovered under this Agreement shall be remain in the Trust Fund until an agreement is reached or the judgment resolving their disputes becomes final.

8. None of the terms herein are intended to release, nor should they be construed as releasing, and it is not the intent of the Parties that any of the terms of this Agreement release, any claims Fibrebond has for payment for its provision of goods and services on the Project against Dawson or its surety.

9. The Parties represent and warrant that there has been no assignment, subrogation, or any other transfer of any interest or claim related to the Project and/or the Project Litigation and related to the claims against Fibrebond or belonging to Fibrebond or Zurich except as stated herein and, if any party to this Agreement has made such an assignment, subrogation, or other transfer, that party hereby agrees to defend, indemnify and hold the other Parties harmless from any claims and/or liens, including costs, expenses and attorneys' fees which are incurred as a result of any person or entity asserting any such right. It is the intention of the Parties that the indemnity referenced in this paragraph does not require payment on a settlement or judgment as a condition precedent to recovery by the party to be indemnified, but the total amount of defense

and indemnity owed shall not exceed Eight Hundred Thousand and no/100 Dollars (\$800,000.00).

10. It is understood and agreed that this settlement is the compromise of disputed claims, and that the payment of the Settlement Amount is not to be construed as an admission of liability on the part of the Fibrebond, and that Fibrebond denies liability and intends merely to avoid litigation and resolve disputed claims.

11. The PBA and Dawson agree to defend, indemnify and completely hold harmless Fibrebond and its agents, former agents, owners, parent corporations, sister companies, parent companies, affiliates, affiliated companies, insurers, owners, bond companies, servants, stockholders, subsidiaries, employees, officers, directors, partnerships, executors, administrators and assigns, and Zurich and its agents, former agents, owners, parent corporations, sister companies, parent companies, affiliates, affiliated companies, insurers, owners, bond companies, servants, stockholders, subsidiaries, employees, officers, directors, partnerships, executors, administrators and assigns against any claims for defense or defense costs asserted against Fibrebond or Zurich related to Fibrebond's work on the Project or claims arising out of the Fibrebond's work on the Project, regardless of the theory of recovery by any entity making a claim: 1) by, through, or on behalf of Dawson or PBA; and/or 2) any surety, insurance company or similar entity that insures either the PBA, Dawson or both ("Indemnified Claims"). Fibrebond and Zurich represent that they are unaware of any claims asserted against them, except as set forth in the Project Litigation as of December 8, 2014. This indemnity and hold harmless covers damages including, but not limited to, attorneys' fees and other reasonable expenses following reasonable notice and demand under this agreement to the PBA and/or Dawson directly, or to their attorney(s) in the Project Litigation. The total amount of defense

and indemnity owed by Dawson and the PBA shall not exceed Eight Hundred Thousand and no/100 Dollars (\$800,000.00).

12. This Agreement may be separately executed in one or more counterparts (including facsimile copies), each of which shall be deemed an original, but all of which shall collectively constitute one and the same instrument. This Agreement may be executed by copies of signatures transmitted via email or facsimile, which shall be deemed to be the equivalent of originals for all purposes.

13. The Parties agree that Fibrebond will be dismissed from the Project Litigation, with each party to bear its own costs and fees.

14. The PBA and Dawson hereby acknowledge that Fibrebond and Zurich are not providing tax advice and they do not believe that Fibrebond and Zurich are providing or have provided any tax advice with regard to this Agreement.

15. The PBA and Dawson further represent that they have not filed, and do not intend to file, bankruptcy.

16. The PBA and Dawson agree that, with respect to this Agreement, no liability shall attain in favor of them, as against any officer, director, member agent, or employee of Fibrebond and Zurich, but rather the PBA and Dawson shall look solely to the assets of Zurich for satisfaction of this Agreement.

17. As part of the consideration for this Agreement, and notwithstanding any other language in this Agreement, Fibrebond hereby assigns to the PBA and Dawson jointly any and all claims Fibrebond has against any individual and/or entity related to the Project and/or Project Litigation, and Zurich hereby assigns any to the PBA and Dawson jointly any and all claims Zurich has against any individual and/or entity related to or arising out of Fibrebond's work on

the Project, the Project Litigation and/or the Policies, with the assignments of Fibrebond and Zurich to include claims against Raley or any of the Raley principals, employees or agents ("Assigned Claims"). Nothing herein shall be construed to mean that Zurich is assigning claims related to work of other entities on the Project or other policies related to the Project. Fibrebond and Zurich make no promise, guarantee, warranty or representation of any kind, except as otherwise stated in this Agreement, as to 1) the assignability of the Assigned Claims, and/or 2) the viability of or amount of the Assigned Claims, and/or 3) any other aspect of the Assigned Claims not stated herein. Fibrebond and Zurich represent and warrant that they have not previously assigned, limited, or released the claims referenced in this Paragraph. Fibrebond and Zurich agree not to take any action to compromise the Assigned Claims. Fibrebond agrees that it will make reasonable efforts upon a timely request by PBA or Dawson to comply with any requests for assistance in prosecuting the Assigned Claims. Payments for expenses, including travel, lodging, meals and employee time will be made in advance of any efforts requested of Fibrebond. . The PBA and Dawson acknowledge and agree that they may not bring any of the assigned claims in the name of Zurich or Fibrebond.

18. The PBA and Dawson agree to use their best efforts to conduct any depositions of Fibrebond necessary for prosecution of Assigned Claims in Shreveport, Louisiana.

19. The Parties agree that should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be construed in favor of or against any party to this Agreement, but rather construing the terms of this Agreement fairly and reasonably in a manner to effectuate the intentions of the Parties hereto.

20. This Agreement is executed and delivered within the State of Alabama and will be construed in accordance with and governed by the laws of the State of Alabama.

21. The Parties further agree that the terms of this Agreement will be binding on their parents, their subsidiaries, affiliates, predecessors-in-interest, successors-in-interest, reinsurers, officers, directors, employees, agents, attorneys, representatives, shareholders, and all other manner of persons and/or entities acting by, through and/or with them.

22. Each of the persons executing this Agreement on whose behalf of the parties they purport to act, hereby represents and warrants that said persons are fully authorized to execute this Agreement on behalf of such party.

23. The Parties to this Agreement and the signatories hereunder hereby acknowledge that they execute this Agreement of their own free will and are under no threat, menace, coercion or distress, whether economic or physical, from any party to the Agreement. The Parties and signatories further acknowledge that they execute this Agreement acting on their independent judgment and upon advice of their respective counsel without any representation, express or implied, from any party except as set forth herein.

24. No breach of any provision of this Agreement can be waived unless in writing, executed by the waiving party. The waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provision of this Agreement.

25. This Agreement may be amended only by a written agreement executed by the parties-in-interest at the time of the modification.

26. This Agreement consisting of 16 pages, is made and executed on the date(s) set forth below and is effective as of the latest date of execution by any party hereto (the "Effective Date").

27. Notwithstanding any other provision, term or agreement contained herein, this Agreement shall not constitute a release of any obligation the Named Insured, Insured, or their

affiliate or subsidiary companies may have, based upon any self-insurance, deductible, retrospectively rated premium, and/or reinsurance, obligation or agreement. Zurich does not release the Named Insured, Insured, their parent, affiliate or subsidiary companies, their reinsurers, or any other person or entity that has a contractual or financial obligation to Zurich arising out of the amounts paid by Zurich as described herein. This paragraph is intended to preserve claims related to exiting insurance policies issues by Zurich and nothing in this paragraph is meant to compromise or otherwise impair the Assigned Claims referenced in paragraph 17, above.

Signatures Included on Separate Pages

The Public Building Authority of the City of
Huntsville, Alabama

By: _____

Its: _____

STATE OF _____)

_____)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the Public Building Authority of the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

GIVEN under my hand and seal this ____ day of _____, 2014.

[SEAL]

Notary Public

My commission expires on:

Dawson Building Contractors, Inc.

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Dawson Building Contractors, Inc.; and he is executing same voluntarily as his own free act.

GIVEN under my hand and seal this _____ day of _____, 2014.

[SEAL]

Notary Public
My commission expires on:

FIBREBOND CORPORATION

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Fibrebond Corporation; and he is executing same voluntarily as his own free act.

Notary Public

My Commission Expires:

ZURICH AMERICAN INSURANCE COMPANY

By: _____

Its: _____

STATE OF _____)

_____)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Zurich American Insurance Company; and he is executing same voluntarily as his own free act.

Notary Public

My Commission Expires:

CITY OF HUNTSVILLE, ALABAMA

By: _____

Its: MAYOR

STATE OF _____)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the City of Huntsville, Alabama, pursuant to a valid resolution passed by the City Council of the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

Notary Public

My Commission Expires: